Supreme Court, U.S.
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No. 98-1971

In the Supreme Court of the United States

DANIEL ROBINSON, ET AL., PETITIONERS,

v.

ADMINISTRATIVE COMMITTEE OF THE SEA RAY EMPLOYEE'S STOCK OWNERSHIP AND PROFIT SHARING PLAN, ET AL., RESPONDENTS,

and

SHARON BALDOCK, ET AL., RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS ADMINISTRATIVE COMMITTEE OF THE SEA RAY EMPLOYEES' STOCK OWNERSHIP AND PROFIT SHARING PLAN, ET AL.

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QUESTION PRESENTED

Whether the Magistrate Judge, district court, and Sixth Circuit properly determined, on the basis of well-settled law and uncontested facts established through the parties' cross-motions for summary judgment, that respondents' determination that no partial termination of the Plan had occurred was not arbitrary and capricious but reasonable and correct.

RULE 29.6 STATEMENT

Respondent Administrative Committee of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan administers the ESOP plan maintained by the Sea Ray Division of Brunswick Corporation for the benefit of its participant employees. Brunswick Corporation is a publicly traded company. Brunswick Corporation has no parent corporation and no publicly held company owns 10% or more of its stock. At the relevant times, respondents William J. Barrington, Diane M. Yaconetti, and William J. McManaman were members of the Committee and employees of Brunswick Corporation.

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STATEMENT

The issue in this case is whether the court of appeals, the district court, and the Magistrate Judge, after considering all of the "facts and circumstances" as required by IRS guidelines, all erred in concluding that there was no partial termination of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan (the "Plan") as a result of reductions in employment levels at Sea Ray Boats, Inc. ("Sea Ray") between 1989 and 1991. Respondents, the Administrative Committee of the Plan (the "Committee") and its members William J. Barrington, Diane M. Yaconetti, and William R. McManaman, filed this declaratory judgment action seeking a judicial ruling upholding their determination that there was no partial termination of the Plan. On cross-motions for summary judgment, the district court (applying the deferential standard of review required by *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989)) accepted the report and recommendation of the Magistrate Judge and granted summary judgment in favor of respondents. A unanimous panel of the Sixth Circuit affirmed, applying settled law to the undisputed factual record in this case. The court of appeals' case-specific decision was correct (as was the determination made by the Committee that no partial termination of the plan had occurred) and raises no issue meriting this Court's review.

1. The Plan And Its Partial Termination Provisions

The Plan is maintained for the benefit of participating employees of Sea Ray. It is a defined contribution stock bonus and profit-sharing plan governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1002(3) & (34), and a qualified plan within the meaning of the Internal Revenue Code (the "Code"), 26 U.S.C. § 401.

The Plan is administered by the Committee. Plan Section 16(c) broadly confers on the Committee "all powers necessary

to enable it to administer the Plan." Pet. App. 97. Those powers expressly include "determining the appropriate allocations to Participants' Accounts," "determining the amount of benefits payable to a Participant," and "construing and interpreting the Plan and the Trust Agreement and adopting rules for administration of the Plan that are consistent with the terms of the Plan documents and of ERISA and the Code." *Id.* at 97-98; see *id.* at 7-8.

The Plan is funded by the employer; participating employees make no contributions. Plan assets are allocated to the individual accounts of participating employees. Pet. App. 3. As ERISA and the Code require, each participant's benefits are "based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." 29 U.S.C. § 1002(34); 26 U.S.C. § 404; Pet. App. 3.

Sea Ray begins contributing to the Plan on behalf of employees after one year of service. However, employees do not become fully vested in their account balances until they have worked at the company for seven years. Pet. App. 3-4. Vesting occurs gradually according to the following formula:

Credited Service	*Vested Percentage*
Less than 3 years	0%
3 years	20%
4 years	40%
5 years	60%
6 years	80%
7 years	100%

Plan § 10, C.A. App. 59-60; Pet. App. 3-4. ERISA expressly permits gradual vesting using this formula. 29 U.S.C. § 1053(a)(1)(B); Pet. App. 3.

In usual circumstances, if an employee leaves the company before completing seven years of service, the nonvested (or forfeitable) portion of his or her account balance is reallocated among remaining Plan participants. Plan §§ 6, 10, C.A. App. 52, 60; Pet. App. 4. However, under the terms of Plan Section 19, if there is a partial termination of the Plan, the account balances of the participants affected by the partial termination become fully vested (nonforfeitable), and the terminated employees are entitled to retain their full account balances without regard to years of service. Pet. App. 4, 100. Section 19 was included in the Plan in order to assure its favorable tax treatment. Code Section 411(d)(3) provides that, in order to be tax qualified, a plan must include a provision that "upon its termination or partial termination * * * the rights of all affected employees to benefits accrued to the date of such termination [or] partial termination * * * or the amounts credited to the employees' accounts, are nonforfeitable."

2. The Plan's Recent History

Sea Ray manufactures and sells a full line of fiberglass motor boats and yachts. Purchase of these high-ticket, durable goods is postponable. In consequence, Sea Ray's business is greatly affected by fluctuations in the economy. C.A. App. 871; Pet. App. 3, 28.

The U.S. boating industry went through an unprecedented cyclical expansion during the 1980s. "Growth surged an average of 35 percent per year from 1983 through 1986, and sales remained at historically high levels from 1986 through 1988." Pet. App. 27. Boat sales then "dropped sharply in 1989 through 1991" and remained flat through 1993. C.A. App. 875, 877. Sea Ray's sales mirrored these trends. From 1985 to 1988, the number of boats Sea Ray sold increased substantially. Sea Ray added $100 million in volume to its business every year. Pet. App. 27. Then, starting with a relatively small decline from 1988 to 1989, the number of boats sold dropped precipitously

through 1991. The decline in sales in 1989 was across all product lines except luxury yachts. Yachts continued to sell relatively well until 1990, when a federal luxury tax targeted high-ticket consumer goods. *Id.* at 4-5, 29, 65. Sea Ray's sales for this time frame were as follows (*id.* at 30):

Year	*Units Sold*
1985	12,456
1986	15,916
1987	22,355
1988	24,538
1989	23,214
1990	14,343
1991	10,542

The expansion and subsequent contraction in boat sales were reflected in the number of Plan participants. As of July 1, 1985, there were 1,501 participants employed at seven locations. Cmplt. ¶ 50; Pet. App. 27. By July 1, 1989, Sea Ray had expanded to thirteen locations and there were 3,832 Plan participants. Cmplt. ¶ 51; Pet. App. 27. The total number of participants during the 1989-1990 Plan year was 4,084—the number at the beginning of the year, 3,832, plus the number added during the year, 252. Pet. App. 38-39.

Unfavorable economic conditions and declining sales beginning in 1989 forced Sea Ray to consolidate operations, close plants, and reduce its workforce. In 1990, Sea Ray closed one plant and consolidated operations at several more. Pet. App. 31-34. By June 30, 1990, the number of Plan participants had declined to 3,060. Cmplt. ¶ 52; Pet. App. 29. The total number of Plan participants during the 1990-1991 Plan year was 3,111—the number at the beginning of the year, 3,060, plus the number added during the year, 51. Pet. App. 39. For the two Plan years 1989-1991, the total number of participants was

4,139—the number at the beginning of the period, 3,832, plus 303 participants added during the period. *Ibid.* Poor conditions continued into 1991. In that year, Sea Ray closed another plant (*id.* at 35), and by June 30, 1991, the number of Plan participants had declined to 1,968. Cmplt. ¶ 53; Pet. App. 29-30.[1]

3. The Plan Committee's Determination That No Partial Termination Had Occurred

The decline in Plan participation raised concerns among the members of the Committee that a partial termination might have occurred during the 1989-1990 and 1990-1991 Plan years. Exercising its Section 16 powers to interpret the Plan and determine allocations to participants' accounts, the Committee discussed the partial termination question at two June 1992 meetings. At its June 12, 1992 meeting, the Committee considered figures on terminations as reflected on Sea Ray's Plan Termination Reports (C.A. App. 696-862), including the reasons for those terminations. *Id.* at 864. The Committee summarized the cyclical business reasons for the decline in Plan participation and discussed the governing legal standards, including the "facts and circumstances" test for partial termination that has been adopted in administrative and judicial interpretations of Code Section 411(d)(3). C.A. App. 864-866; Pet. App. 5-6, 24-25.

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[1] Terminations of Plan participants did not create or increase the possibility of a reversion of Plan assets to Sea Ray. Reversion is not a possibility with a defined contribution profit-sharing and ESOP like the Sea Ray Plan. See 1 Michael J. Canan, *Qualified Retirement and Other Employee Benefit Plans* 293 (1995) ("A profit-sharing or stock bonus plan cannot return any of its assets to the employer. Thus, forfeitures by participants must be reallocated to other participants"). Under ERISA, the Plan could not and did not include a provision that would allow reversion.

Subsequently, at its June 26, 1992 meeting, the Committee determined that no partial termination had occurred, expressly utilizing the "facts and circumstances" test. C.A. App. 868; Pet. App. 6, 25. The Committee

> discussed the fact that layoffs were dictated by business conditions in a cyclical business. * * * The Committee members concluded that there were no facts or circumstances other than the layoff due to the cyclical business which would dictate a finding of a Partial Termination. It was noted that forfeitures would not reduce the Company's required contributions or create or increase the possibility of a reversion to the Company. It was also noted that the terminations were not motivated by a desire to discriminate in favor of highly compensated employees, as evidenced by the fact that terminated employees were the first to be recalled as jobs became available.

C.A. App. 868. Thus, the Committee determined that participants who terminated employment at Sea Ray from 1989 to 1991 and who were not fully vested in their account balances were not entitled to become fully vested. The nonvested portions of their account balances would be forfeited and allocated to the remaining participants in the Plan. The Committee held the reallocation of these forfeitures in abeyance until it obtained a judicial determination of whether there had been a partial termination of the Plan. *Id.* at 869; Cmplt. ¶¶ 61-62.

4. District Court Proceedings

The Committee filed this declaratory judgment action, naming two putative classes as defendants. Class I defendants—petitioners here—are all the former Sea Ray employees (and their beneficiaries) who were participants in the Plan, whose service at Sea Ray ended between July 1, 1989, and June 30, 1991, and who had an interest in the Plan that was not fully

vested when their employment ended. Class II defendants—co-respondents here—are all the present and former Plan participants (and their beneficiaries) who may be entitled under the terms of the Plan to receive a portion of the account balances forfeited by Class I members if there has been no partial termination. The suit seeks a declaration that there has not been a partial termination of the Plan, that petitioners are thus not entitled to the accelerated full vesting of their account balances that would flow from a partial termination, and that the nonvested portions of petitioners' account balances should therefore be allocated to the remaining Plan participants. Pet. App. 21-22.

The parties filed cross-motions for summary judgment. The Magistrate Judge's comprehensive, 79-page opinion—subsequently "accepted in whole" by the district court (Pet. App. 19)—recommended that the summary judgment motions of the Committee and the Class II defendants be granted and that the motion of the Class I defendants be denied. *Id.* at 88.

Initially, the Magistrate Judge held that the Committee's determination that there had been no partial termination could be upset only if it was arbitrary and capricious. Following *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), a plan administrator's exercise of discretionary powers granted by the plan is reviewed for abuse of discretion. Pet. App. 39-45. Here, the Magistrate Judge reasoned, Plan Section 16(c) granted the Committee "all powers necessary * * * to administer the Plan," including authority to "construe and interpret the Plan," determine "appropriate allocations to Participants' Accounts," and determine "the amount of benefits payable to a Participant." Thus, the "Plan clearly grants the Committee the authority to interpret the term 'partial termination,'" which appears in Plan Section 19. And whether there had been a partial termination affects appropriate allocations to participants' accounts and the amount of their benefits. *Id.* at 44-45.

The Magistrate Judge then concluded that the Committee's determination was reasonable and not arbitrary and capricious. Following Sixth Circuit precedent, the Magistrate Judge reasoned that under the IRS's "facts and circumstances" test, "two general inquiries" are relevant to whether there has been a partial termination: "the percentage of Plan participants who were involuntarily excluded from the Plan" and "the motives of the decision maker." Pet. App. 57.

Percentage of involuntary terminations. To determine the percentage of involuntary terminations, the Magistrate Judge found that "the Plan should be analyzed in separate years" because "[t]he circumstances surrounding the large boat layoffs [in 1990-1991] were distinctly different than those for the small boats" in 1989-1990. After yachts continued to sell well in 1989-1990, the federal luxury tax resulted in an "additional large wave of layoffs" in 1990-1991 that otherwise would not have occurred. Pet. App. 64-65.

The Magistrate Judge also found that voluntary terminations from Sea Ray should not be counted for purposes of determining whether there had been a partial termination. Thus, 648 employees who, during the two-year period in issue, quit voluntarily, retired, died, or became disabled were excluded from the relevant terminations. The Magistrate Judge rejected petitioners' argument that all terminations after layoffs began should be regarded as involuntary on a "constructive discharge" theory. Pet. App. 66, 75, 79. With these principles in mind, the Magistrate Judge calculated the percentage reductions using the following formula (*id.* at 80-81):

$$\frac{\text{Total reduction - excludable employees}}{\text{Total participants including those added during year,}}$$

which produced these percentage reductions in each of the Plan years in issue:

1989-1990: $\frac{1,024 - 373}{4,084} = 15.9\%$

1990-1991: $\frac{1,143 - 275}{3,111} = 27.9\%.$

The total percentage reduction for both Plan years together was less than 40%:

1989-1991: $\frac{2,167 - 648}{4,139} = 36.7\%.$

The Magistrate Judge agreed with petitioners that, "generally, a percentage [reduction in plan participants] above 50 percent will be determinative of the occurrence of a partial termination." "[F]igures below 20 percent" will rarely indicate a partial termination. Reviewing the case law, the Magistrate Judge recognized that when terminations are between 20 percent and 50 percent, a "sliding scale" applies. Between those figures, the percentage reduction "will be significant only if combined with other factors," in particular evidence of employer abuse of the plan or bad faith. Pet. App. 76-77.

Employer motives. The Magistrate Judge acknowledged that an employer may act in bad faith and abuse a plan by excluding participants to increase the amount of a reversion of plan assets to the employer, to increase the plan benefits of a favored group of employees, or to decrease the employer's contributions to the plan. Pet. App. 82-83. As the Magistrate Judge noted, however, petitioners did "not argue that Sea Ray was motivated by improper motives in terminating the employees," and "[there is] [n]o evidence of abuse" of the tax qualified status of the Plan. *Id.* at 83.

The district court accepted the "exceptionally well-reasoned" report and recommendation of the Magistrate Judge. Pet. App. 17. The court held that the Magistrate Judge "was clearly correct" in applying the arbitrary and capricious standard of

review, and that it was "entirely reasonable" to analyze each year separately because of the "distinct causes" of the layoffs in each year. *Id.* at 18-19. After "carefully conduct[ing] a *de novo* review of the record," the district court "agree[d] that the percentage of Plan participants terminated was insufficient for a finding of a partial termination" and that the motions of the Committee and Class II for summary judgment should therefore be granted. *Id.* at 17, 19.

5. The Sixth Circuit's Decision

The Sixth Circuit reviewed *de novo* the district court's grant of summary judgment and upheld that decision without dissent. Pet. App. 7. The court of appeals held that "a plain reading of the Plan reveals that it clearly grants discretion to the Committee." *Id.* at 9. It rejected arguments that the Committee lacked discretion to determine whether a partial termination had occurred because the Plan does not define the term "partial termination," and that "eligibility determinations are questions of law subject to de novo review." *Id.* at 9-10. The court thus proceeded to "review the Committee's determinations regarding partial terminations under the arbitrary and capricious standard." *Id.* at 10.

In calculating the percentage of Plan participants who were involuntarily terminated, the court of appeals held "that the economic downturn in 1989 and the federal luxury tax in 1990 * * * stem from two independent factors." Pet. App. 12-13. The court also held that, under governing law, the record could not support a finding that everyone who left Sea Ray after layoffs began was "constructively discharged." *Id.* at 13. Accordingly, the Sixth Circuit agreed with the percentages used by the district court. *Id.* at 14.

Finally, the court considered "the effects on the plan" and "the employer's motives." Pet. App. 14. The court "dismissed" both factors, since no party had alleged that layoffs at Sea Ray

"financially impaired" the Plan or that "Sea Ray was motivated by improper motives." *Id.* at 15.

The court of appeals concluded that the Committee's determination "was neither arbitrary nor capricious." In light of "the percentage of terminations" and "the absence of any damage to the Plan or improper motive for profit, the Committee was reasonable in concluding that the Plan had not been partially terminated." Pet. App. 15. The court summarily denied Class I's petition for panel or en banc rehearing. *Id.* at 94-95.

REASONS FOR DENYING THE PETITION

The petition for certiorari asks this Court to decide fact-bound issues that were correctly decided by the courts below. None of the questions presented raises an important or recurring legal issue as to which there is a conflict among the circuits, and none warrants this Court's review. We address each of the four questions presented by petitioners in turn.

I. THE SIXTH CIRCUIT'S DETERMINATION THAT THE PLAN GRANTS THE COMMITTEE DISCRETION CORRECTLY APPLIED *FIRESTONE* AND CONFLICTS WITH NO DECISION OF ANY OTHER CIRCUIT.

Petitioners ask this Court (Pet. 9) to review the Sixth Circuit's determination that on a "plain reading," the language of Section 16(c) of the Plan "clearly grants discretion to the Committee" to determine whether a partial termination has occurred. Pet. App. 9-14. The Magistrate Judge, the District Judge, and the unanimous court of appeals all concurred in this interpretation of the particular language of the Sea Ray Plan. Petitioners purport to identify inconsistencies in the case law concerning the interpretation of plan language. The plan language at issue in the decisions cited by petitioners, however, is *different* from the language of the Sea Ray Plan and irrelevant

to this case. The "conflicts" petitioners identify are therefore all nonexistent. Petitioners point to *no* authority that casts any doubt on the correctness of the lower courts' considered interpretation of Section 16(c) of the Plan.

The court of appeals engaged in a very standard application of the test set forth in *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), assessing "whether the ERISA plan grants the administrator 'authority to determine eligibility for benefits or to construe the terms of the plan.'" Pet. App. 9 (quoting *Firestone*). The court noted that Section 16(c) made express reference to the Committee s "discretion" and specifically gave the Committee powers to determine allocations to participants' accounts, to determine what benefits are payable, and to construe and interpret the Plan—all of which powers were involved in the Committee's determination that no partial termination had occurred. Pet. App. 7-8. The court properly held that the plain language of Section 16(c) thus easily satisfies the *Firestone* standard. *Id.* at 9; see *Firestone*, 489 U.S. at 111 (when a trustee is "given power to construe disputed or doubtful terms * * * the trustee's interpretation will not be disturbed if reasonable").

Petitioners assert that there are conflicts among the courts of appeals in their application of *Firestone* to particular plan language, but none of those alleged conflicts involves issues or plan language anything like the controlling plan language here. For example, petitioners contend (Pet. 9-10) that there is a split of authority between courts that say only a "clear grant of discretion" triggers deferential review of plan administrators' decisions and those that say that discretion may be implied. But whether or not there is any such disagreement, this case plainly does not present that issue for resolution. No party to this litigation has ever claimed that the Plan's grant of discretion should be implied from the Plan language. The Committee

argued—and the courts below all agreed—that the Plan language here "clearly grants discretion to the Committee." Pet. App. 9.

Equally unavailing is petitioners' request (Pet. 10-11) that the Court should resolve an asserted conflict between *Perez* v. *Aetna Life Ins. Co.*, 150 F.3d 550 (6th Cir. 1998) (en banc), and *Kearney* v. *Standard Ins. Co.*, 175 F.3d 1084 (9th Cir. 1999) (en banc). Those cases concern whether plan language requiring "satisfactory" proof of disability conferred discretion on a plan administrator. That question, too, is not presented by this case; no remotely similar issue or plan language is implicated here.

There is no inconsistency (Pet. 13) between the Sixth Circuit's decision here and either its prior ruling in *Wulf* v. *Quantum Chem. Corp.*, 26 F.3d 1368 (6th Cir. 1994), or the Eleventh Circuit's decision in *Kirwan* v. *Marriott Corp.*, 10 F.3d 784 (11th Cir. 1994). In finding that the plan in *Kirwan* did not grant discretion, the court emphasized that the plan—unlike the Sea Ray Plan—contained "no grant of authority to construe [the plan's] terms." 10 F.3d at 789. The plan at issue in *Wulf* provided "nothing more than a grant of authority to make rules for the administration of the Plan, with the provision that the committee's decision respecting any dispute as to the meaning or application of the rules is final"; it nowhere contained any grant of authority to interpret the plan. 26 F.3d at 1374. In contrast, the Sea Ray Plan broadly grants the Committee the power to determine allocations to participants' accounts, to determine what benefits are payable, and to construe and interpret the Plan. Like the other cases cited by petitioners, *Kirwan* and *Wulf* do not address any issue raised by this case.

As the cases cited above demonstrate, the courts of appeals have shown themselves perfectly capable of construing plan language to determine if the specific plan at issue grants discretion to the plan administrator to make a particular

determination, thereby triggering review solely for reasonableness. The inquiry whether a plan grants discretion depends entirely on the language of the specific plan. Petitioners have provided no reason why this Court should get involved in parsing the language of the Sea Ray Plan, nor have they explained how its doing so would assist the lower courts.

II. THE SIXTH CIRCUIT APPLIED THE ARBITRARY AND CAPRICIOUS STANDARD CORRECTLY AND CONSISTENT WITH PRECEDENT.

Petitioners also complain (Pet. 14-18) about the court of appeals' use of the arbitrary and capricious standard to review certain elements of the Committee's partial termination determination. Petitioners again rely on a claimed split of authority regarding issues not presented by this case, and again fail to identify any issue appropriate for decision by this Court.

1. Petitioners assert that the Committee's partial termination determination resolved a "question of law" and was "a matter of statutory interpretation." Pet. 14. Petitioners contend that a court should give no deference to a plan administrator's resolution of such a question.

The inquiry whether a partial termination has occurred is, however, *intensely factual*. As the court of appeals explained, whether there has been a partial termination depends, under governing law, on "all the facts and circumstances." Pet. App. 11. The relevant "facts and circumstances" include whether there has been a "sharp reduction in levels of plan participation; [an] increase in the possibility of discrimination in favor of officers, shareholders or highly-compensated employees; [or] the creation or increase of the possibility that plan assets may revert to the employer," none of which factors is by itself controlling. *Id.* at 51-52 (citing IRS, *Plan Termination Handbook* § 252). This Court need not expend its limited resources reviewing the

unexceptionable, fact-specific application of a well-established multi-factor test.

Even if the Committee's partial termination decision could be described as the determination of a "question of law," that would be of no consequence. This Court's decision in *Firestone* and lower court precedent would still require use of the arbitrary and capricious standard of review. Indeed, *Firestone* itself concerned the interpretation of a benefit plan—that is, the interpretation of a contract and trust document—which is always a question of law. *Firestone*, 489 U.S. at 114-115; see, *e.g.*, *Lake* v. *Metropolitan Life Ins. Co.*, 73 F.3d 1372, 1376-1377 (6th Cir. 1996) (level of benefits available under a plan is "a matter of contract interpretation"); *Golden* v. *Kelsey-Hayes Co.*, 73 F.3d 648, 653 (6th Cir. 1996) ("[q]uestions of contract interpretation are generally considered questions of law"); *Ulmer* v. *Harsco Corp.*, 884 F.2d 98, 101-102 (3d Cir. 1989) (plan interpretation is a question of law); *Estate of West*, 560 N.W.2d 810, 812 (Neb. 1997) ("interpretation of the words of * * * a trust is a question of law").

Since *Firestone*, lower courts have routinely applied the arbitrary and capricious standard to review plan administrators' interpretations of plan terms that involve legal concepts and statutory terms. See *Borda* v. *Hardy, Lewis, Pollard & Page, P.C.*, 138 F.3d 1062, 1066-1068 (6th Cir. 1998) (arbitrary and capricious standard applies to plan administrator's determination under plan language that "simply mirror[ed]" Code provision); *Cvelbar* v. *CBI Ill., Inc.*, 106 F.3d 1368, 1379-1380 (7th Cir.) (reviewing for reasonableness plan administrator's interpretation of Code provision referred to in plan), cert. denied, 522 U.S. 812 (1997); *Trombetta* v. *Cragin Fed. Bank ESOP*, 102 F.3d 1435, 1438-1439 (7th Cir. 1996) (reviewing for reasonableness determination that plaintiffs were not "employees"); *James* v. *Louisiana Laborers Fund*, 29 F.3d 1029, 1032-1033 (5th Cir. 1994) (reviewing for reasonableness determination that rested on

interpretation of state criminal law); *Metropolitan Life Ins. Co.* v. *Potter*, 992 F. Supp. 717, 728-730 (D.N.J. 1998) (reviewing for abuse of discretion determination that death was not "accidental" as defined by case law); *Blessing* v. *Deere & Co.*, 985 F. Supp. 899, 906-907 (S.D. Iowa 1997) (reviewing for reasonableness determination regarding existence of common law marriage under state law); *Helton* v. *ACS Group*, 964 F. Supp. 1175, 1179-1180 (E.D. Tenn. 1997) (reviewing for reasonableness interpretation of state criminal law).

Petitioners are wrong when they assert, without analysis, that *Gauer* v. *Connors*, 953 F.2d 97 (4th Cir. 1991), and *Pratt* v. *Petroleum Prod. Management, Inc. Employee Sav. Plan & Trust*, 920 F.2d 651 (10th Cir. 1990), are to the contrary. Pet. 14. In *Gauer*, the question was not how to interpret the plan, but "whether the Trustees' interpretation of the Pension Plan [was] consistent with ERISA regulations." 953 F.2d at 100. The case thus concerned only the construction of the regulations, and not of any plan language. In *Pratt*, the court found that the plan gave the plan administrators discretion "to decide questions of plan interpretation." 920 F.2d at 658. The court accordingly applied the arbitrary and capricious standard and overturned the plan administrator's decision only because it was "unreasonable" and contrary to the plan's "unambiguous" provisions. *Id.* at 660, 662. To the extent that *Weil* v. *Retirement Plan Admin. Comm.*, 913 F.2d 1045 (2d Cir. 1990), vacated in part, 933 F.2d 106 (2d Cir. 1991), and *Penn* v. *Howe-Baker Eng'rs, Inc.*, 898 F.2d 1096 (5th Cir. 1990), suggest a different analysis than that applied by the courts below, they are aberrational decisions that have not been followed in the more recent cases cited above, even in their own circuits. See *James*, 29 F.3d at 1032-1033 (the Fifth Circuit reviewed a plan administrator's determination of a state law question for abuse of discretion).

2. Petitioners also claim that the courts of appeals are divided over the appropriate standard of review for plan administrators' *factual* determinations. Pet. 15-16. Even if there were such a disagreement, it would provide no basis for review of this case. The issue of the standard of review for factual determinations was not addressed below because petitioners did not raise it in their briefs to the court of appeals and therefore waived it. Moreover, the issue has no bearing on the outcome of this case, which was decided on cross-motions for summary judgment, with all parties agreeing that the dispositive facts are not in dispute.[2]

In any event, even if deference to a plan administrator's fact finding were appropriate only when the plan grants discretion to make factual determinations, Section 16 of the Sea Ray Plan clearly provides that authority. See Pet. App. 97-98 (Plan grants Committee power to "resolv[e] all questions relating to the eligibility of Employees," to "determin[e] the appropriate allocations to Participants' Accounts," and to "determin[e] the amount of benefits payable").[3] The applicability of *Firestone* to

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[2] Petitioners' arguments about the lower courts' separation of plan years and treatment of the constructive discharge issue (Pet. 23-26) do not reflect any disagreement over the facts. The questions petitioners raise concern only whether the lower courts applied appropriate legal standards (regarding when plan years should be considered separately and when an employee should be considered constructively discharged) to the undisputed factual record.

[3] Petitioners' reliance on *Anderson* v. *Great West Life Assurance Co.*, 942 F.2d 392 (6th Cir. 1991), is badly misplaced. See Pet. 17 n.7. The court there made *no* determination regarding the effect of plan language granting the administrator the power "to determine the amount of the benefits." The court merely found that the district court had improperly relied on pre-*Firestone* precedent, and it remanded the case to the district court for reconsideration using the correct legal standard. 942 F.2d at 394-396.

purely factual determinations ought to be considered, if at all, in the context of a case in which the question was actually litigated and is genuinely in controversy.

Petitioners conclude (Pet. 17) with a plea that there is, in general, a "need for further guidance on these [two] issues." But the specific plan language and facts underlying *this* case present no difficult or disputed questions. This litigation presents no occasion for the Court to provide "further guidance" on the issues that, petitioners claim, vex other ERISA cases.

III. THE SIXTH CIRCUIT PROPERLY CONSIDERED THE EVIDENCE SUPPORTING THE PLAN ADMINISTRATOR'S DETERMINATION.

1. Petitioners ask this Court to review the issue "whether the court was limited to considering the evidence considered by the Committee" on *de novo* review. Pet. 18. The question of what evidence may be considered on *de novo* review is irrelevant here because, as the courts below properly held, under *Firestone*, judicial review of the Committee's discretionary decision was for abuse of discretion, not *de novo*.

Putting that defect aside, petitioners' argument is a red herring. The Committee had before it ample evidence to justify its decision and every basis upon which the Magistrate Judge, district court, and court of appeals upheld the reasonableness of that decision.

As petitioners have conceded (C.A. Opening Br. 39-40), the Committee was presented with figures on terminations as reflected in Sea Ray's Termination Reports, including the reasons for and timing of those terminations. See C.A. App. 696-862, 864. Those figures and reasons, the timing of terminations, the uncontested lack of any possibility of reversion of forfeitures to the company, and the uncontested absence of improper motives for the Committee's determination were the facts relevant to the decisions of the Committee and of the

reviewing courts alike. Pet. App. 5-6. The conflict petitioners say exists among the circuits over whether new evidence can be a proper basis for finding a plan administrator's decision reasonable (*id.* at 18-20) is therefore irrelevant to any issue in this case, which has been decided throughout on the basis of evidence before the Committee. *Cf. Perry* v. *Simplicity Eng'g*, 900 F.2d 963, 966 (6th Cir. 1990) (identifying an issue as to whether *Firestone* requires "district courts to hear and consider evidence *not presented to* the plan administrator") (emphasis added).

2. Petitioners pose (Pet. 19, 25) the different question whether a court, reviewing the evidence before the plan administrator, may find the administrator's determination reasonable based in part on additional grounds not articulated by the administrator.

Petitioners point to only one factor relied on by the courts below that was not explicitly set forth in the Committee's minutes: measuring the percentage of terminations in each of the two plan years at issue separately. Pet. 20, 25. But the Committee was well aware of the link between terminations in large yacht facilities in 1990-91 and the new luxury tax. See Pet. App. 65. Anyway, separating out the plan years, *regardless of whether the luxury tax initiated a second "corporate event,"* is correct as a matter of law. See *Tipton & Kalmbach, Inc.* v. *Commissioner*, 83 T.C. 154 (1984) (calculating reductions of 34 per cent and 51 per cent in consecutive years before concluding that there was a partial termination); IRS, *Plan Termination Handbook* § 252(5)(c), C.A. App. 663 (separating the *Tipton* reductions into two years).[4]

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[4] Petitioners cite the district court's decision in the *Gulf Pension Litigation*, 764 F. Supp. 1149 (S.D. Tex. 1991), to try to cast doubt on the proposition that it is legally correct to measure terminations year by year. Pet. 24. But in affirming *Gulf Pension*,

Moreover, even if terminations here were aggregated over the 1989-91 period, they totaled less than 38%. Pet. App. 80-81. In the absence of plan abuse, which has never been alleged here, it is not unreasonable to find that a 38% reduction in plan participation over two years did not amount to a partial termination. Pet. App. 76-77; *cf.* IRS, Doc. 6678, *Plan Termination Standards* 2 (1981) (citing rulings that 57.5 per cent and 80 per cent reductions were partial terminations); *Tipton & Kalmbach* (34 per cent and 51 per cent reductions in successive years were partial termination); *Peter M. Boruta, M.D., P.C.* v. *Commissioner*, 55 T.C.M. (CCH) 670 (1988) (66-2/3 per cent); Rev. Rul. 72-439, 1972-2 C.B. 223 (70 per cent). Given turnover rates in industry that average 15-20% per year, even in normal times, employers may commonly experience turnover in the region of 38% over two years.[5]

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the Fifth Circuit stated that because it did not decide the partial termination question, the district court's (controversial) views on that issue were not conclusive even between the parties. *Borst* v. *Chevron Corp.*, 36 F.3d 1308, 1314 n.11 (5th Cir. 1994).

[5] See, *e.g.*, Mark A. Huselid, *The Impact of Human Resource Management Practices on Turnover, Productivity, and Corporate Financial Performance*, 38 Acad. Mgmt. J. 635 (1995) (survey of major industries showed average turnover of 18.36 per cent); Gerald L. White, *Employee Turnover: The Hidden Drain on Profits*, 72 HR Focus 15 (Jan. 1995) (in "many industries * * * turnover rates exceed 75 percent"); BNA, *Quarterly Reps. on Job Absence & Turnover* (1989-90) (C.A. App. 882-889) (median turnover rate for all companies for the year beginning July 1989 was 12.2 per cent).

IV. THIS CASE RAISES NO ISSUE ABOUT THE STANDARDS FOR SUMMARY JUDGMENT THAT WARRANTS THIS COURT'S REVIEW.

Petitioners ask this Court to grant certiorari to consider whether the court of appeals erred by applying a "clearly erroneous" standard of review to "findings" by the district court (1) that terminations could properly be measured in separate plan years because the wave of terminations that occurred during the second plan year was triggered by the luxury tax, (2) that the Committee did not have to treat every person who voluntarily left employment after layoffs began as having been constructively discharged, and (3) adopting Class II's termination figures. Petitioners suggest that use of a "clearly erroneous" standard was inappropriate on review of the grant of a motion for summary judgment, because the proper standard is whether there is any material and genuine issue of disputed fact. Pet. 21-26.

The standards for ruling upon and reviewing rulings upon motions for summary judgment are well established and well understood by the lower courts. *E.g.*, *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986). The court of appeals correctly stated those standards at the outset of its opinion. Pet. App. 7. It noted that summary judgment is appropriate only where "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law," and it explained that "[t]his court draws all reasonable inferences in favor of the non-moving party." *Ibid.* The court of appeals also stated that it reviews the district court's grant of summary judgment under these standards *de novo*. *Ibid.*

Petitioners have made no pretense that there is confusion in the lower courts about the proper standard of review of grants of summary judgment. At best, petitioners' claim is that this

Court should review the Sixth Circuit's decision because, having correctly stated the applicable standard for review of the district court's decision on cross-motions for summary judgment at the outset, the court of appeals then misstated the standard later in the opinion. Pet. App. 12. That hardly presents a certworthy issue.

Review of the applicability of the "clearly erroneous" standard is particularly unnecessary because the district court did not make any factual findings. Rather, the district court reviewed the Committee's determination to see if, based on the facts before the Committee, that determination was reasonable. That reasonableness inquiry did not require resolving any factual disputes or making any factual findings. See note 2, *supra*. For example, it was *the Committee* that excluded from the termination figures Plan participants who voluntarily left Sea Ray after layoffs began—not the district court. See Pet. App. 67. The district court merely determined that, in light of the settled law of constructive discharge, that exclusion had not been unreasonable. *Id.* at 72-76. The district court's rejection of petitioners' termination figures simply followed from its conclusion that the Committee had not acted unreasonably in excluding certain participants—because petitioners' figures included as terminees participants who had been excluded by the Committee. Pet. App. 81-82. Thus, no amount of hand wringing about the role of the clearly erroneous standard in ERISA summary judgment cases could lead to a different result in this case. There is no sign at all that the courts of appeals are confused about the correct standard of review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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